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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: WAC 01 241 56217 Office: CALIFORNIA SERVICE CENTER Date: FEB 27 2003

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in April 1994. It claims to be engaged in trading, investment, and the operation of a Chinese fast food service and restaurant. It seeks to employ the beneficiary as its president and chief executive officer. Accordingly, it endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the record did not demonstrate that the beneficiary would be performing in a primarily managerial or executive capacity for the petitioner. The director also determined that the petitioner had not established its ability to pay the proffered wage.

The petitioner asserts that the beneficiary has performed the duties of a manager or executive with the United States company and has the ability to pay the proffered wage.

Section 203(b) of the Act states, in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification

is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the beneficiary has been and will be employed in a managerial or executive capacity for the petitioner.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily-
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> i. manages the organization, or a department, subdivision, function, or component of the organization;
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> ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily-
>
> i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner initially stated that the beneficiary would perform all the duties of a president, and in general, supervise and control the business affairs of the company. The petitioner also stated that the beneficiary would plan, develop, and establish the policies and objectives of the business and the responsibilities and procedures for attaining the objectives. The petitioner further stated that the beneficiary would review reports and statements, revise objectives and plans in response to the review, and direct the formulation of financial programs. The petitioner finally noted that the beneficiary would exercise authority in regard to hiring, firing, training, delegation of assignments as well as conduct performance reviews.

The director requested additional evidence including a more detailed description of the beneficiary's duties. The director also requested the petitioner's organizational chart describing its managerial hierarchy and staffing levels and an explanation of the source of remuneration for all employees.

In response, the petitioner provided the same job description previously provided with the petition and added that the beneficiary "currently manages and directs seven employees including restaurant manager, cook specialty [sic], cashier and workers." The petitioner also added that the beneficiary spends the following amounts of time on various duties:

> She spends 20% of her time to negotiate with bank and budget planning, 30% of time to discuss with manager and cooks regarding menu, daily supply, 20% of time to take care main problem of restaurant such as health department, gas company, telephone company and etc., 20% of time to discuss with accountant for the general ledger of the company, 10% of time to recruit new employees and evaluation of their performance.

The petitioner also provided a list of its employees and brief job descriptions. The list includes the beneficiary as president, a restaurant manager, a Chinese specialty cook, and kitchen help. It appears that the list of employees is missing a page.

The director determined that the petitioner had not established that the beneficiary would be primarily engaged in executive duties because the enterprise had not established its need for an

executive and, based on the number of staff, the beneficiary would necessarily be involved in non-qualifying duties. The director also determined that the beneficiary would not qualify as a manager as the beneficiary was primarily a first-line manager over non-professional and non-managerial employees. The director further determined that the beneficiary was not a functional manager as the petitioner had not clearly demonstrated that the beneficiary managed the function rather than performing the function.

On appeal, the petitioner re-states the position description previously provided and adds that the beneficiary obtained her L-1A status in 1994. The petitioner also states that it has six employees and submits its California DE-6, Employer's Quarterly Tax Returns for the quarters ending September 30, 2001, December 31, 2001, and March 31, 2002.

The petitioner has not presented a persuasive argument on appeal. The petitioner's re-statement of the beneficiary's duties does not contribute to a finding that the beneficiary has been or will be performing in a managerial or executive capacity. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner must submit a statement that clearly describes the duties to be performed by the beneficiary. Simply stating that the beneficiary will have ultimate authority and control over the petitioner's business matters is an insufficient job description, as handling all business matters can encompass a wide-range of duties that are both managerial and executive or non-managerial or non-executive. The petitioner's broad job description essentially paraphrases a portion of the definition of "executive capacity." *See* section 101(a)(44)(B)(ii). Moreover, going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); *see generally Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner's additional response to the director's request for evidence added information that indicates the beneficiary had been and would be performing operational tasks of the petitioner. Negotiating with the bank, discussing the menu and supplies, dealing with the health department, gas and telephone companies is more descriptive of tasks that involve the necessary operational activities of the company. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In addition, the record does not contain independent information on the number and type of the petitioner's staff at the time of filing the petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire*, 17 I&N Dec. 248,249 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner's assertion on appeal that it employs six individuals does not reference a specific time period for the employment of those six individuals and the California DE-6 Forms do not cover the quarter in which the petition was filed. The record does not contain independent documentary evidence of the petitioner's staff at the time the petition was filed. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra*.

In the instant case, the petitioner has failed to establish that its organizational structure consists of staff members in varying positions who execute the non-qualifying day-to-day tasks of the petitioner's operations. Therefore, the Service must affirm the director's denial on the basis that the beneficiary is not working and will not continue to work in a primarily executive or managerial capacity. The record is not sufficient to establish that the beneficiary has been or will be employed in a managerial or executive capacity.

The second issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered wage of $31,200 per year.

8 C.F.R § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner initially submitted its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for the year 1999. The IRS Form 1120 revealed that the petitioner had only paid $5,300 in salaries and wages, no compensation to officers, and had a negative income of $24,864. The director requested additional information from the petitioner to address the issue of its ability to pay the beneficiary the proffered wage. The petitioner responded by submitting an unaudited balance sheet and

statement of income. The director determined that the unaudited statement was not sufficient to establish the petitioner's ability to pay the proffered wage.

On appeal, the petitioner submits its IRS Form 1120 for the year 2001 covering the fiscal time period of May 1, 2001 through April 30, 2002. The petition was filed April 30, 2001. The Service still does not have independent evidence of the petitioner's ability to pay the beneficiary the proffered wage at the time of filing the petition. The petitioner has not overcome the director's determination on this issue.

Beyond the decision of the director, the petitioner has not established that a qualifying relationship exists between the petitioner and the claimed parent company. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities, in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity.

The petitioner has submitted confusing information in regard to this issue. The petitioner states that it is a wholly-owned subsidiary of a Chinese company. The petitioner has submitted two stock certificates to establish this ownership. However, the petitioner on its IRS Form 1120 filed for 1999 and 2001 reveals that the beneficiary owns 100 percent of the petitioner. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). For this additional reason the petition may not be approved

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.